In *Eastham (Inspector of Taxes)* v. *Leigh London and Provincial Properties Ltd.*[7] the appeal concerned an assessment of capital gains tax as a result of disposing of a capital asset acquired earlier at a profit. In 1962 the taxpayer entered into a contract with the owners of a site to put up a building within two years at a cost of not less than £270,000. It was agreed that on the completion of the building the taxpayer would be granted 125 years from 1962. In fact, the lease was granted in 1964. In 1965 the lease was assigned for £587,000. Held, dismissing the Crown's appeal, that the 1962 contract was not a conditional contract and that the land was acquired at the date of contract. At page 891, Buckley L.J. said: —

"That is not, in my judgment, a condition precedent to the contract at all, it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it merely indicates what is part of the terms of the bargain, just as in all contracts for sale the terms of the bargain are customarily described as conditions of sale."

The same thing was said by Danckwert L.J. in *Emerton's* case at page 324: —

"On the face of the document, the contract is an ordinary contract of sale and purchase, and although 'conditions' are referred to, the matters so referred to are merely the terms of the sale and purchase, and the contract would, in my opinion, not normally be regarded as a conditional sale and purchase."

In the present case any talk about conditions precedent or conditional contract is misleading. It is irrelevant and tends to cause confusion. The facts are clearly distinguishable from *Aberfoyle's* case. There the contract was conditional on the vendor obtaining a renewal of certain leases. As the condition precedent was not satisfied there was no contract of sale; the relationship of vendor and purchaser was not created. Hence, the purchaser was entitled to the refund of deposits. In the present case appellants said the vendors could keep the deposit. Clearly, the option to forfeit the deposit rests with the vendors under clause 14. If appellants were right there would be no contract of sale as a condition precedent had not been fulfilled and they should be entitled to refund of the deposit. The question whether the contract is conditional or not depends entirely on the interpretation of the sale agreement. The "conditions" agreed by the parties were nothing more than the terms of the contract. The fact that a "condition" is a term of a contract does not make it a conditional contract. There are no conditions precedent in the present case as understood in *Aberfoyle's* case. With respect, I can find no reason to interfere with the decision of the learned judge. Accordingly, I would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Wan Suleiman and **Chang Min Tat F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

TINDOK BESAR ESTATE SDN. BHD. v. TINJAR CO.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and Syed Othman F.JJ.)
November 20, 1978 and January 19, 1979]

[Kota Kinabalu — Federal Court Civil Appeal No. 10 of 1978]

Contract — Contract in writing — Whether parol evidence admissible to prove implied undertakings in construing agreement — Illegality — Misrepresentation and Fraud — Whether parties in pari delicto — Evidence Act, 1950, s. 92.

Evidence — Contract in writing — Whether parol evidence admissible — Evidence Act, 1950, s. 92.

Land Law — Temporary Occupation Licence — Land used as road — Non-transferable — Whether permission to use road in breach of condition and illegal — Sabah Land Ordinance (Sabah Cap. 68).

Practise and Procedure — Pleadings — Amendment — Application made at hearing of appeal — Application dismissed — Federal Court (Civil Appeal) (Transitional) Rules, 1963 — R.S.C. 1957, O. 58 r. 4.

In this case the appellant had been employed as a contractor by a company for the extraction of timber. The appellant agreed to furnish the necessary vehicles and to provide the buildings for the accommodation of the workers and for other necessary purposes and also to build a road leading to and from the timber area. It bought vehicles on hire-purchase and applied for and obtained a Temporary Occupation Licence of land on which was constructed the road. Subsequently the appellant agreed to withdraw and agreements were made whereby the respondent undertook the work of extracting the timber and the appellant's agreement with the company was cancelled. The respondent thereupon entered into an agreement with the appellant whereby the respondent agreed to buy over from the appellant the vehicles at an agreed price subject to the payment of the remaining instalments of the hire-purchase to the hiror and paying an agreed sum for the appellant's infrastructure and the road. The respondents paid the amount due to the appellants under the agreements by instalments which were paid by post-dated cheques, the last of which for $45,000 was dishonoured. The appellant brought the action to claim the sum of $45,000 and interest. The respondents admitted giving the post-dated cheques but it challenged the validity of the agreement on the ground *inter alia* of illegality, fraud and misrepresentation. It counterclaimed for the sum of $90,000 which had been paid by it under the agreement to the appellant. At the trial in the High Court the learned trial judge dismissed the claim and allowed the counterclaim for the refund of $90,000 with interest and damages. He held that the entire agreement was tainted with illegality and it was not severable, that the respondent was not *in pari delicto* because its partners were in ignorance of the law and had acted under strong pressure and because of the fraudulent misrepresentations of the appellant. The learned Judge decided to admit parol evidence to prove the implied undertakings in construing the agreement and he then considered and found fraud and deceit on the part of the appellant. The appellant appealed.

Held, allowing the appeal: (1) the parol evidence was wrongly admitted by the trial judge as the evidence did not fall within either proviso (b) or proviso (c) of section 92 of the Evidence Act but was evidence adding a new term or terms to the agreement;

(2) on the facts the charges of fraud and misrepresentation against the appellant could not be sustained;

(3) the evidence sought to be adduced to show misrepresentation, deceit and fraud ranged far beyond the confines of the respondent's pleadings. The respondent's application to amend the pleadings must be disallowed, as it was made at the appellate stage and there was no good and strong justification for it;

(4) although the Temporary Occupation Licence is not transferable the statute does not prohibit the giving of permission to use the rights under it. In this case all the appellant did was to permit the respondent to use his rights under the Temporary Occupation Licence and there was nothing illegal about such an arrangement;

(5) the appellant could not be held liable for damages arising from the cancellation of the Temporary Occupation Licence as Clause 9 of the agreement clearly provided that the respondent was not entitled to such damages.

Cases referred to:-

(1) *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [1971] 2 M.L.J. 161.

(2) *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 M.L.J. 200.

(3) *Govindaraju* v. *Krishnan* [1962] M.L.J. 334.

(4) *Ban Seng* v. *Yap Pek Soo* [1967] 2 M.L.J. 156.

(5) *Coalfields of Burma Ltd.* v. *H.H. Johnson* A.I.R. 1925 Rang. 128.

(6) *Foo Tock Lim* v. *Piong Liew* [1963] M.L.J. 67.

(7) *Siah* v. *Tengku Nong* [1964] M.L.J. 43 F.C.

(8) *Yuill* v. *Yuill* [1945] P. 15.

(9) *Curran* v. *William Heill & Sons (St. Helens) Ltd.* [1961] 3 All E.R. 108 C.A.

(10) *S.M. Allan (Merchandising) Ltd.* v. *Cloke* [1963] 2 W.L.R. 899.

FEDERAL COURT.

Cecil Abraham (*John Kah* with him) for the appellant.

F.C. Leong for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo): I have read the judgment of Chang Min Tat F.J. with which I agree. I would like to say a few words on two matters.

First, an attempt was made by respondents to amend the defence and counterclaim during the hearing of this appeal. Normally, application for amendment should be made at the trial as early as possible to prevent surprise. The terms of the amendment should also be submitted at the earliest possible time to the other party or parties and handed to the judge when the application is made. Appellant only came to know of the intention of respondents to apply for amendment on the day of the hearing of this appeal. Although rule 8(1) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 and Order 58 rule 4 of the Rules of the Supreme Court confer on this court the power of the High Court as to amendment it has rarely been exercised. If amendment was necessary respondents should ask for leave to make it at the proper time and in the proper manner. This court will only permit amendment on very good ground and strong justification. Leave to amend was refused.

Secondly, the defence of illegality must fail *in limine*. The significant common feature of the cases of *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.*[1] and *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.*[2] was the transfer by a colourable device of rights under a timber licence issued under the forest legislation. In both cases the agreements were held to be illegal, being in breach of the forest legislation. The facts of the present case are very different from the two cases in that the transaction did not involve the transfer of rights under a timber licence which was in the hands of Sugut Enterprise Co. Sdn. Bhd. The transaction merely involved the taking over by one contractor from another contractor of contract works for and with the consent of Sugut Enterprise Co. Sdn. Bhd. A T.O.L. is not the same as a timber licence as the former is issued by the Land Office under the provisions of the Sabah Land Ordinance. It is difficult to see how the transaction between two contractors not involving any transfer of rights under a timber licence could be said to be illegal. Appellant tried all he could to get the Assistant Collector of Land Revenue to grant a T.O.L. to respondents. Until the T.O.L. was cancelled, respondents had been using the road and houses under it. Although the T.O.L. is not transferable the statute does not prohibit letting of a house built on land held under a T.O.L. The letting on rent does not amount to a transfer of a licence and is not illegal. In *Govindaraju* v. *Krishnan*[3] and *Ban Seng* v. *Yap Pek Soo*[4] appellant never transferred the T.O.L. to respondent. All the appellant did was to permit respondent to use his rights under that T.O.L. There was nothing illegal about such an arrangement.

I agree that the appeal be allowed with costs here and in the court below and that judgment be entered in favour of appellant in the sum claimed and that the counterclaim be dismissed. Deposit to be refunded to appellant.

Chang Min Tat F.J. (read by Lee Hun Hoe C.J. (Borneo)): The appellant, Tindok Besar Estate Sdn. Bhd., was the contractor employed under an agreement in writing dated October 20, 1971, by Sugut Enterprise Co. Sdn. Bhd. (Sugut) for the extraction of timber. The extraction was to be at the rate of 2,400 acres per year so that in a concession of 17 square miles or 9,600 acres approximately, the contract had about four years to run. The contractor was to furnish the necessary vehicles and to provide the buildings for the accommodation of the workers and for other necessary purposes and also to build the road leading to and from the timber area. It consequently bought under hire-purchase agreements five caterpillar vehicles. It applied for and obtained a Temporary Occupation Licence (TOL) and over the ribbon of land comprised in the TOL, it constructed at its own costs a road. Perhaps the more correct version is that it built the road and then obtained a TOL for its use. It also built the houses and other buildings, collectively called the infrastructure, necessary for the purposes of the workmen and for the other purposes.

After about one year of operation or less, the appellant desired to pull out of the contract. It was partly for financial reasons. Tinjar Company, a partnership firm, was prepared to step in. As a result of negotiations, Tinjar Co., the respondent, entered into an agreement on November 29, 1972 with Sugut and the appellant's agreement with Sugut was cancelled. The two agreements with only a necessary difference in the name of the contractor, were identically worded.

It meant, of course, that the respondent had to supply the vehicles, the infrastructure and the access road. It did so as being the most convenient means for all concerned, by buying over from the appellant the caterpillar vehicles at an agreed price subject to the payment of the remaining instalments of the hire-purchase to the hiror and paying an agreed sum for the appellant's infrastructure and the road. The terms of the two purchases were incorporated in one agree-

ment made on November 29, 1972. They could very well have been in two agreements.

1. *The Agreement*

The whole action turns on this agreement and it is perhaps necessary to examine it in some detail. It recited that the respondent as assignee would take over the appellant's timber operation. By Clause 1, in consideration of the sum of $270,000 to be paid by instalments as in manner provided, the appellant assigned its rights, benefits and liabilities under the hire-purchase in respect of the five caterpillar vehicles. $60,000 from the consideration was to be paid by the respondent directly to Sugut in discharge of the appellant's debt. The balance was to be paid by instalments of varying amounts. The first was paid on the execution of the agreement and the remaining 4 instalments on or before the 20th day of each succeeding month. The last instalment of $45,000 was to be paid by April 20, 1973. For these payments, post-dated cheques were issued.

Clause 3 provides for the substitution of the respondent as the hirer with the hiror. Clauses 4-7 inclusive spell out the usual contingencies if the respondent failed to pay any of the instalments. Clause 8 refers to the agreement with Sugut for the respondent to take over the timber extraction.

Then the agreement came to the "sale" of the infrastructure and of the rights to the road. Clause 9 incorporates this sale. It reads as follows:

"9. In consideration of the sum of $90,000 (Ninety thousand dollars) to be paid by the Assignees on the date of signing this Agreement, the Assignor shall permit the Assignees to take over and use the buildings, road and other infrastructure constructed by it within the area of timber operations in Ulu Segama and the roads within the TOL (Temporary Occupation Licence) issued to it. The Assignor shall indemnify the Assignees against any claims made in respect of such take over and use provided that such indemnity does not extend to any action that may be taken by the Government or Sugut Enterprise Company Sendirian Berhad in respect of the said buildings, roads or other infrastructure within the said areas."

The exact implications of this particular clause which will decide this appeal will be seen in the context of the evidence and the relevant law.

2. *The Temporary Occupation Licence (TOL)*

It may be convenient at this stage to refer to the TOL, and perhaps necessary, since so much turns on it, to reproduce it entirely:

SABAH, MALAYSIA
SCHEDULE IV
(Section 10)

s.k. Pengarah Tanah &
Ukor, K.K., Juru
Ukor Daerah, L/DATU
Pegawai Hutan
Daerah, L/Datu

R.T.1004/59/II/116—20.11.1972
DOLD(L)39/05/III/39
L.A. 72111137

TEMPORARY OCCUPATION LICENCE

No. 11 9 50458
District Lahad Datu

Tindok Besar Estate Sdn. Bhd.

IS/ARE HEREBY PERMITTED TO OCCUPY for the period from 1st January 1972 to 31st December 1972 the portion of State land described or as shown on the sketch plan below.

2. This licence does not create a tenancy and, as against the State, does not give exclusive right to occupation of the land described or shown on the sketch plan below. It may be revoked at any time without notice or compensation and is subject to the special conditions endorsed below.

3. This licence is not transferable or assignable in any manner whatsoever and must be produced on demand to the Director of Lands and Surveys or any Collector or Assistant Collector of Land Revenue.

4. No permanent buildings shall be constructed or permitted to be constructed on the land occupied under this licence.

5. No rubber, coconut or fruit trees shall be planted or permitted on land occupied under this licence nor any crop other than short term crops.

6. The licencee shall comply with the reasonable requirements of any Government Health Officer.

7. Breach of any condition of this licence renders the licence liable to immediate cancellation.

SPECIAL CONDITIONS AND DESCRIPTION OF LAND OR SKETCH PLAN

1. Temporary occupation of this land is permitted for the purpose of Road Access.
2. The area requested is only 2 chains x 10 miles (160) acres only;
3. The rent is $4,000 per year that is $25 per acre;
4. That the width of the said road is 2 chains i.e. 1 chain from the centre to edge of the road;
5. Extraction charge of 0.70 cents per square foot should be collected on and from Royalty charge on all logs found in the area of Road Access mentioned;
6. The Government has the right to allow other applicants to use the said road;
7. Photograph of the said Road Access must be submitted to the District Surveyor, Lahad Datu and Assistant Collector of Land Revenue, Lahad Datu.

Land Office
(Date) 25.11.1972

	Receipt No.	*Date*
Licence Fee $4.000	10241493	25.11.72
Registration fee $10	AB166310	25.11.72

Entered in the Register of Temporary Occupation Licences kept in the District Land Office.
(Date) 25.11.1972

Sgd. ?
Assistant Collector
of Land Revenue.
Sgd. ?
A.C.L.R.

It is to be noted, firstly, that the TOL issued under the Sabah Land Ordinance (Sabah Cap. 68) in the form set out in Schedule IV is on a printed form, with only the office references, the name of the licensee and the period of validity typed in. Special conditions (2, 3, 4, 5, 6 and 7 above) were also inserted. It follows therefore that Clauses 2, 3 and 7 above are fixed terms of each and every TOL under the Sabah Land Ordinance. Secondly, the purpose of the licence was restricted to road access. Thirdly, though the period of validity was for the year ending December 31, 1972, the licence was in fact paid for and registered only on November 11. The date of issue was November 20, 1972. Whatever the reason for this might be, the relevant fact is that at the time of the agreement, the appellant had rights to the road which he had contracted to transfer to the respondent according to the tenor of this Clause 9.

A TOL is by law not transferable. The relevant section of the Land Ordinance reads as follows:

"18. (1) The Collector may issue Temporary Occupation

Licences in the form of Schedule IV for the use of any Crown land for temporary purposes as may be specified in such licences. Any Temporary Occupation Licence issued under this subsection shall be non-transferable and shall be subject to the payment of such fee and to such other conditions as the Collector shall endorse on such licence.

(2) No such licence shall be issued for a longer period than three years.

Provided that the Collector may renew such licence from time to time for any period provided that no licence shall be extended so that the total consecutive period of such licence, including any renewals, extends beyond three years unless the Director by writing under his hand agrees to such extension."

It is to be noted that no TOL is extended beyond three years under normal circumstances. The usual term would appear to be one year.

3. *The litigation: (a) pleadings*

The respondent delayed payment of the other instalments and then altogether stopped payment of the last instalment of $45,000 which fell due on April 20, 1973. The appellant consequently on August 14, 1973 issued out a writ for the payment of this sum of $45,000 and agreed interest of $3,230.87 on the strength of that part of the agreement relating to the assignment of the vehicles.

In an amended defence and counterclaim served on October 26, 1973, the respondent admitted its failure to pay the $45,000 and agreed that there was a stipulation for interest on late payment. But it denied that the sum claimed and the interest thereon were owing by reason of the illegality in Clause 9 of the agreement.

It might be noted that this court was advised from the Bar that after it had stopped the extraction, the respondent sold the vehicles which had by then passed over to it and pocketed the proceeds.

In the counterclaim, the respondent averred that it was not *in pari delicto* and therefore could claim for the refund of the $90,000 paid for the road and the infrastructure. The reasons were because it was "under the mistaken beliefs or impressions" induced by the appellant that (1) the TOL had at least one year to run from the date of the agreement and (2) it was transferable or could be registered in its name. Also, it was given undertakings made at or about the time of the execution of the agreement that the appellant would secure the transfer or registration of the TOL in its name and until such transfer or registration would renew the TOL for its benefit. The respondent then charged the appellant with acting in breach of its undertaking; alternatively, with acting fraudulently, by surrendering the TOL. By its action, there had been a total or partial failure of consideration. It had also spent considerable sums to maintain the access road within the TOL area.

It also claimed in paragraphs 16 and 17 damages (the paragraphs 16 and 17 damages) from the fraudulent surrender of the TOL by the appellant, which had deprived it of toll from other users of the road and had resulted in its surrender.

It is to be observed that the contention that it was not *in pari delicto* and the counterclaim were grounded specifically on misrepresentation as to the duration and the transferability of the TOL and its fraudulent surrender. Nowhere in the pleadings was there any averment that the contracting members of the respondent firm were in ignorance of the law as to the non-transferability of the TOL. It is also to be noted that nowhere was there any claim for loss of profits resulting from the surrender of the TOL.

(b) *The issues*

On the pleadings as they stood at the time and at the appeal to the Federal Court, the main issue is clearly whether Clause 9 is in breach of the condition against transfer of the TOL and illegal. If it is, then side issues arise, (i) whether the agreement was severable so that the illegality in Clause 9 would not effect the assignment of the vehicles, and (ii) whether the respondent was *in pari delicto*. The issues in the counterclaim were (i) whether there was fraudulent surrender and (ii) whether there was misrepresentation with regard to the terms of the TOL.

(c) *The judgment*

On December 2, 1977, a 73-page judgment was delivered. The claim was dismissed and the counterclaim allowed, for the refund of $90,000 with interest and damages in the sum of $208,755.50. The sum of the damages awarded was the alleged difference between the net income to be deprived from a projected production of 2,325,000 cu. ft. of timber and the actual production of 1,919,042 cu. ft. for the year ending December 31, 1973 (page 276 Record).

The learned trial judge held, stated shortly, that the entire agreement was tainted with illegality and it was not severable, that the respondent was not *in pari delicto* because its partners were in ignorance of the law and had acted under "strong pressure", since the appellant had given implied undertakings to grant to the respondent exclusive use of the access road and to assign or cause the TOL to be renewed to the respondent, and that because of these breaches of undertakings, the appellant was in fraud of the respondent. The learned judge decided to admit parol evidence to prove the implied undertakings in construing the agreement, and went on to consider and find fraud and deceit on the part of the appellant.

4. *Admission of parol evidence and section 92 Evidence Act*

The decision to admit all the extrinsic evidence sought to be introduced by the respondent was, as stated by the learned judge, for the purpose of ascertaining all the other terms of the contract which had not been reduced to writing (page 58 of his judgment).

"This is, in the court's opinion, clearly one in which the principle laid down by the authorities the court is bound to go behind the written terms of the Agreement and to elucidate the real facts of the transaction. That being so, the court has taken into consideration the evidence which has been produced on behalf of the defendants' version of the circumstances under which the Agreement was executed."

Reliance was had to the headnotes of a case which read "unwritten terms of contract can be proved by oral evidence": *Coalfields of Burma Ltd.* v. *H.H. Johnson.*[5] That was a case where there was no written agreement. All the respondent had was a letter wherein he was told he was appointed manager at a certain salary. That letter did not contain the other terms of his employment, in particular the

"perks" which in those days of colonial expansion frequently added to the salaries of expatriate appointees. It became necessary to prove what some of those perks were and as the learned judge here observed, where all the terms of a contract have not been reduced to writing, the terms so left unwritten could be proved by oral evidence. What he failed to observe, however, is that all the terms in this case had been reduced to writing, and the case he relied on is no authority for what he proposed to do. Section 92 specifically excludes evidence to contradict, vary, add to or subtract from any of the terms of a contract in writing, except in any of the situations spelled out in the provisoes thereto: see, *inter alia, Foo Tock Lim* v. *Piong Liew*[6] and *Siah* v. *Tengku Nong*.[7]

It is not the case of the respondent that any of the provisoes to section 92, except possibly proviso (a), applies. Its contention therefore for the admission of the parol evidence which won the approval of the learned judge was that not all the terms had been incorporated in the agreement. If this contention so generally stated and understood had any foundation at law, then it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law. I think and I say so with respect, the fundamental mistake made by the learned judge is to conclude simply and without qualification that section 92 applies only to a case where all the terms of the agreement have been reduced to writing. But that is not what section 92 says. It merely says "where the terms ..." and by referring back to section 91, it means where the terms of a contract have been reduced to writing, as in this particular agreement they had been, the contract could only be proved by the document itself, and it is not open to the respondent to seek to introduce and the judge to admit evidence that would, *inter alia*, add new terms to it.

However section 92 allows, so far as it concerns this particular case, evidence in proviso (b) of "any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms" and in proviso (c) of "any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract...." The provisoes qualify but do not eliminate the main provisions of the section, so that unless the additional evidence sought to be adduced falls within the scope of any of the provisoes, it should not be allowed to be introduced as it would be to contradict, vary, add to or subtract from the terms of the agreement. It will be readily seen that the evidence which the respondent sought to introduce did not fall within either of these two provisoes but was evidence adding a new term or terms to the agreement. It is equally obvious that the respondent's pleadings did not aver the existence of such terms.

5. *The alleged fraudulent surrender of the TOL*

It is not disputed by the appellant that it did, on December 20, 1972, in other words, within one month of reaching agreement with the respondent, write to the Assistant Collector of Land Revenue, Lahad Datu, (ACLR) the issuing authority of the TOL (see letter at page 238 of the Record) but it was not to surrender the TOL, as alleged by the respondent. It indicated that because it had now surrendered the contract to Sugut and the access road as well, it did not intend to renew the TOL when it expired on December 31, but its letter stressed that it was "essential" that Sugut should apply for permission to use the road access. A copy of this letter was in fact sent to Sugut.

It would perhaps be more relevant if the appellant had referred to the substitution of its contract with Sugut by the respondent's contract and had advised that it was "essential" that the new contractor should have the use of the road. But if Sugut had been given the licence and had allowed the respondent to use the road, or if Sugut had thereupon advised the ACLR that the interested party was the respondent, the same effect would have been achieved.

However, on January 26, 1973, the appellant did write to the ACLR referring to the respondent as the present contractor of Sugut and asking for the TOL to be issued to the respondent "as from this year" to enable the new contractor to fulfill its obligations under the contract with Sugut. Copies of this letter were sent to the respondent and to Sugut. If therefore the appellant had made a mistake previously, it had set about correcting it almost certainly to the satisfaction of the respondent since at no time then did it raise any voice of protest or complaint.

The fact is that the TOL was renewed for 1973 at the appellant's expense in its name as appeared by an endorsement on the reverse of the TOL, after the respondent had itself made an application for the licence and presumably had been refused.

It is also common ground that from the date of the agreement the respondent had use of the access road and right through the period of indecision until the ACLR in a circular letter (page 240) to the appellant, the respondent, Sugut and 2 other interested parties, called for the cancellation of the TOL. In so doing, the ACLR was careful to note that there was nothing affecting the good name of the appellant. On the cancellation, the ACLR declared the access road a public road. The cancellation was, the court is advised from the Bar, in August 1973.

6. *Misrepresentations and Fraud*

As earlier observed, misrepresentations were said in the counterclaim to be in connection with the duration and the transferability of the TOL and fraud with the purported surrender of the TOL.

In my view and with respect, on the evidence of the appellant's letters to the ACLR, however it might have been mistaken in its intention not to renew the TOL, its motive was for Sugut to acquire it and give it to the respondent to use. It clearly never had any intention to surrender the TOL or to harm the respondent. Then when it was advised that there were other applicants and that it should make the application for renewal, it promptly did so for the year ending

December 31, 1973, at considerable expense to itself, and without thinking up to this stage of asking for a refund from the respondent, so that in practical effect, it had a TOL which the respondent had the full use of. In these circumstances, the charge of fraud could, with respect, hardly be said to have any foundation at all.

With regard to misrepresentation, the oral evidence as to when the respondent was given sight of the TOL is in conflict. It said it was not given a copy until very much later. The appellant said it was within a short time after the agreement. If it was true that the respondent had no sight earlier but had only received a copy of the TOL rather later than this, it was certainly not so late that it could say it was induced by misrepresentation. On February 12, 1973 it received a photo-copy and acknowledged the receipt in a letter which should be set out for its full terms and effect, as it is, in my view, a complete answer to the case for the respondent on misrepresentation and fraud.

"TINJAR COMPANY
14 Permaisuri Road
P. O. Box 615
MIRI, Sarawak
13 February 1973

Mr. Ngui Tsun Yu
Tindok Besar Estate Sdn Bhd
No. 3, Fifth Lane
SANDAKAN, Sabah

Dear Mr. Ngui

REF: TOL NO: 11950458

We have received the photocopy of the above-mentioned TOL and your letter dated January 10, 1973 on the February 12, 1973.

Since the renewal is merely stamped on the map and not accompanied by a letter from the District Office in Lahad Datu, we have asked our manager in Lahad Datu to check on the validity of this renewal and how long is it valid for before advising our banker to release payment to you.

We regret this delay which is due to the policy of our company to check on the legality of all relevant documents.

As soon as our manager confirms the validity of the renewal we will cable our banker to release payment and also inform you of it.

Yours faithfully
Sgd.
Yong Foh Choi

cc The Manager
Tinjar Company
P. O. Box 171
Lahad Datu, Sabah."

This letter raises the following inevitable comments: the partners in the respondent firm are all cautious businessmen, and since the cheques in payment of the instalments to the date of the letter which had been held back were then authorised to be paid, the respondent must have checked on and must have been satisfied at this time with the validity of the renewal of the TOL and the period of its validity. It must give the lie then to any subsequent oral evidence that the respondent despite its pleadings had been given to expect that the TOL had more than a year to run and had acted on this misrepresentation or that it had made it a condition that the TOL was to be transferred to it.

Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity. It may be advantageous at this stage to recall the words of Lord Greene M.R. in *Yuill* v. *Yuill*[8] at pages 19-20:

"We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an infavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

There is another point. It is small but not without significance. On the duration of the licence on which the agreement is silent, the oral evidence of the respondent was to the effect that it was represented that they would get a licence for the duration of their timber contract work, that is for 3-4 years whereas its pleadings specified one year.

7. *Evidence of misrepresentations, fraud and deceit*

If fraud was proved, it would vitiate the agreement under proviso (a) to section 92, which reads "Provided that —

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;"

The evidence that was led by the respondent ranged far beyond the confines of its pleadings. A submission by the appellant is made to this court that there were no pleadings and no particulars to justify the evidence. How valid the submission is can be perhaps gauged by the attempt made by learned counsel for the respondent, not at the beginning of the day

or in a proper application, but orally and at the end of the submission for the appellant (though oral notice was given to the appellant on the day itself), to introduce a further amended defence and counterclaim.

The application was disallowed, after some arguments, *inter alia*, for the simple reason as in *Curran* v. *William Heill & Sons (St. Helens) Ltd.*[9] that on the evidence to which I have adverted the respondent could not possibly succeed on the amended pleadings which provided post-factum justification for it.

8. *The illegality of the agreement and whether the parties are in pari delicto*

The learned judge held the agreement illegal but found that the respondent was not *in pari delicto* and therefore entitled to recover.

It may be convenient to deal first with his finding that the respondent was not *in pari delicto*. As observed earlier, one of the reasons was that the respondent was in ignorance of the law. The full maxim is *ignorantia juris neminem excusat* and the true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter; so when 2 persons together have the common design to use a subject-matter for an unlawful purpose, so that each participates in the unlawful purpose, then that contract is illegal in its formation and it is no answer for them to say that they did not know the law on the matter: see *S.M. Allan (Merchandising) Ltd.* v. *Cloke*[10] at page 903. Therefore even if it is true that the partners in the respondent firm who were experienced timber-men from Sarawak where the law is identical did not know that Sabah law prohibits the transfer of a timber-licence and a TOL, as the learned judge found, that plea avails them nothing.

Then at page 67 of the judgment, the learned judge says:

"It seems plain to this court upon the evidence that the defendants must have been induced to enter into the Agreement by fraud or strong pressure. That being the true position, I am driven to the conclusion that the defendants are not *in pari delicto* with the plaintiff and I so find. There was accordingly failure of consideration under clause 9 of the said Agreement."

With the greatest of respect, the failure of consideration, if any, does not flow from the fraud or strong pressure, where the fact in this case was that the respondent continued to enjoy the benefits of the agreement until it decided to abandon the work sometime in 1974, and throughout it had the use of the road, though in dispute with others and after its declaration as a public road, in common with others. If its enjoyment and use of the road were in any way affected by parties other than the Government or Sugut, it could claim against the appellant under the indemnity provision in Clause 9 of the agreement but it could not be said by any stretch of the imagination to have suffered from a failure of consideration. It is with respect a complete non-sequitur as a conclusion from fraud.

Then whatever is meant by it, "strong pressure" was never pleaded and no evidence of it was given in the case for the respondent. Neither was fraud as particularised in the pleadings proved. The respondent charged the appellant with fraudulently surrendering the TOL but in the end and as effectively as could be desired, the appellant had in the circumstances a TOL which it could give the respondent to use for the one year it said it had bargained for and therefore obtained.

On the question of illegality, this court has, in *Lo Su Tsoon Timber Development* v. *Southern Estate Sdn. Bhd.*[1] and later in *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.*,[2] held that a transfer of the rights in a licence which is statutorily non-transferable is illegal and the court will not come in aid to enforce it. Any colourable device which is in effect a transfer is similarly illegal. But there is a difference between the transfer of the rights contained in a licence and permitting the use of it. Thus a monthly letting of two rooms in a house built on state land under a TOL which was not transferable, is not prohibited by statute or made illegal by the non-transferable provision: *per* Ismail Khan J. (as he then was) in *Govindaraju* v. *Krishnan*[3] at page 335, followed in *Ban Seng* v. *Yap Pek Soo*.[4]

In my view and with respect, the contention of the appellant that what Clause 9 says was that the appellant shall permit the respondent "to take over and use" the road within the TOL issued by it, and that this was not a transfer of rights but a permit to use and therefore not illegal as against the non-transferability provision is correct.

Confirmation for this view can be found in special condition 5, which provides that the Government has the right to allow other applicants to use the said road. This court is advised that this road serves timber areas other than those worked by Sugut and the question of toll to be collected by the party who constructed the road at its expense apart, usage of the road makes for accessibility and the economic development of the region.

9. *Severability*

If my view is correct, the question of severability does not arise.

10. *Damages for the respondent*

There still remains for decision the question of damages for the respondent. Its claim for the refund of $90,000 for the infrastructure and the road was based entirely on fraud and misrepresentation and in my view, on the evidence, must fail. But there is the claim for paragraphs 16 and 17 damages for loss of toll and for the cancellation of the TOL still to be decided. It was the contention of the respondent that the person who constructed a jungle road at his own expense had the right to collect toll from other users of the road and that this right was assigned by the appellant to it. However the learned trial judge had, though he found entirely for the respondent, strangely not made any award to it for such loss of toll. What he had awarded was loss of projected profits from the cancellation of the TOL, a claim which was not pleaded. On the loss of the toll, can this appellate court do what he had failed to do? Even if it tries, there is no evidence of the rate and the volume of traffic to enable it to do so. Nor is there any evidence that those other users did not come within the class

of users permitted by the ACLR in special condition 5 in the TOL to use the road and who would presumably not have to pay toll. If it is impossible at this stage for this court to do more, the respondent has only itself to blame.

As for the damages arising from the cancellation of the TOL by the Government, Clause 9 clearly provides that the respondent is not entitled to any such damages. The entire burden of the respondent's complaint at the trial was that the TOL did not have one year to run as it, so it alleged, was induced by the fraud or misrepresentation of the appellant to believe and rely on. But the point, and this point was missed entirely by the trial court, is that in the event, the TOL had more than a year to run and it would have run out that year but for the intervention of the ACLR, a *novus actus interveniens* which the appellant was totally unable to prevent or forestall, which it knew it would be unable to prevent or forestall and which it had so providentially provided for in Clause 9.

Conclusion

I would allow the appeal with costs here and in the court below. There shall be judgment for the appellant in the sum claimed. The counterclaim is dismissed, also with costs.

Syed Othman F.J.: I have had the opportunity of reading the judgments of the learned Chief Justice and my learned brother Chang Min Tat F.J.

I entirely agree with them that this appeal should be allowed on the grounds stated in the judgments and with costs as indicated.

Appeal allowed.

Solicitors: *Jayasuriya Kah & Co.; Leong Chong & Tseu.*

HOE JOO SAWMILLS v. SIGMA (AIR CONDITIONING) SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Raja Azlan Shah Ag. C.J. (Malaya) and Wan Suleiman F.J.) February 3, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 26 of 1978]

Practice and Procedure — Appeal — Application for extension of time to serve notice of appeal on respondent — Service by ordinary post — Proof of delivery of letter — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 7 and 32(1) — R.S.C. 1957, O. 67 rr. 2 and 3.

In this case the appellant had been granted leave to appeal from the judgment of the High Court whereby the respondent was given liberty to sign final judgment against the appellant. Notice of appeal was filed by the appellant within the one month allowed by the rules but there was a question whether the copy of the notice of appeal was served on the respondent within that period. The appellant alleged that a copy of the notice was sent to the respondent by ordinary post. The appellant applied by a notice of motion for an order that (a) service of the notice be deemed as good and effective service on the respondent, or (b) the time for service of the notice of appeal on the respondent be extended.

Held: (1) the posting of the notice, even if effected within time cannot by itself be deemed or considered to be sufficient service in the absence of proof of actual delivery and of the date of delivery;

(2) the reason given for the application for extension was the fault of the solicitor's clerk and this has been decided to be insufficient for the granting of special leave.

Cases referred to:-

(1) *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153, F.C.

(2) *Tong Lee Hwa & Anor.* v. *Malayan Banking Berhad* [1978] 1 M.L.J. 257.

(3) *Hendry* v. *De Cruz* [1949] M.L.J. Supp. 25.

FEDERAL COURT.

Khoo Eng Chin for the appellant.

Raja Abdul Aziz for the respondent.

Raja Azlan Shah Ag. C.J. (Malaya) (delivering the judgment of the Court): The substantial question that arose in the motion before this court is that of service of the notice of appeal by the applicant qua appellant on the respondent. Leave having been granted to the applicant to appeal from an interlocutory judgment on April 13, 1978 on the same day it was entered, the applicant was required by rule 7 Federal Court (Civil Appeals) (Transitional) Rules, 1963 to file in the Registry his notice of appeal within one month from the judgment and serve a copy of the same on the respondent at the same time. "At the same time" does not mean simultaneously. So long as the service on the respondent was effected within one month of the judgment sought to be appealed from, the service was effective: *Tan Ting Kok* v. *Cheong Lep Keen & Anor.*[1] But unless both filing and service are effected within this period, the appeal has not been brought to the Federal Court, and no appeal lies except by the special leave of the full Federal Court: Rule 13.

No difficulty presents itself over the filing of the notice of appeal in the Registry of this court. It was done on April 27, well within the one month allowed. But there is some dispute over the service on the respondent. The respondent averred that up to the present, it has not been served. The appellant would appear to contend that it effected the service by ordinary post on May 5. What it really contended was that it put through the post a copy of the notice for postal delivery to the respondent but it was obviously unable to say with any certainty whether the letter was in fact delivered and if so, when. It is to be remembered that it had to be delivered on or before May 13, 1978. The appellant nevertheless considered that it had effected the service on the respondent but notwithstanding this contention, applied by notice of motion for an order that:

(a) the service of the notice of appeal on the respondent/plaintiff herein on May 5, 1978 be deemed as valid and effectual service of the same on the respondent, or

(b) the time for service of the notice of appeal on the respondent be extended,

and by an amendment (c) for special leave.

With respect the first order prayed for appears to be an inconsistency. Service is a question of fact. If the notice was served within time, the service was good and no necessity arises for any prayer in aid. But apparently it was thought that service by ordinary